[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

MARSHALL G. VANCE,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the
Superior Court of New Jersey, Appellate Division

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

DAVID S. BAIME
DEPUTY ATTORNEY GENERAL
CHIEF, APPELLATE SECTION
DIVISION OF CRIMINAL JUSTICE
STATE OF NEW JERSEY
OF COUNSEL

ROBERT E. ROCHFORD
DEPUTY ATTORNEY GENERAL
STATE OF NEW JERSEY
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION
7 GLENWOOD AVENUE
EAST ORANGE, NEW JERSEY 07017
ON THE BRIEF

LEGAL MIMEOGRAPHING SERVICE
198 South Harrison St., East Orange, N.J. 07018
(201) 445-4782 (201) 672-8282

TABLE OF CONTENTS

PAGE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE
PROCEDURAL HISTORY 2
FACTUAL BACKGROUND 3

REASONS FOR DENYING CERTIORARI 4

CONCLUSION 16

CASES CITED

ALBUQUERGUE v. ARIAS, 64 N.M. 337, 328 P.2d 593, 594 (Sup.Ct. 1958) 11

APODACA v. OREGON, 406 U.S. 404 (1972) 14

ARNDT, In re, 67 N.J. 432, 436, 341 A.2d 596 (1975) ... 7

AUSTIN v. DENVER, 170 Colo. 448, 462 P.2d 600, 603-604 (Sup.Ct.1969), cert. den., 398 U.S. 910 (1970) 10

AUSTIN v. UNITED STATES, 299, A.2d 545, 546-547 (D.C. App. 1973) 10

BALDWIN v. NEW YORK, 399 U.S. 66, 69-70 (1970) .. 8,9,12

BARRON v. MAYOR AND CITY COUNCIL, 32 U.S. 243 (1833) 5

BERBERIAN v. LUSSIER, 87 R.I. 226, 139 A.2d 869 (Sup.Ct.1958) 13

BLOOM v. ILLINOIS, 391 U.S. 194, 198 (1968) 6

BLUE JEANS CORP. v. AMALGAMATED CLOTHING WORKERS OF AMERICA, 275 N.C. 503, 169 S.E.2d 867 (App.Ct.1969) 12

BRIEHRER, In re, 50 N.J. 501, 517-518, 236 A.2d 592 (1967) 7

BUFFALO v. CANNIZZARIO, 17 Misc. 2d 839, 188 N.Y.S.2d 795, 798 (Sup.Ct.1959) 10

OUGH POOR COPY

CASES CITED (continued) PAGE

CALLAN v. WILSON, 127 U.S. 540 (1888) 6

CARUSO v. PORTER, 102 N.J.L. 71, 73, 130 A. 805 (Sup.Ct.1925) 7

CHEFF v. SCHNACKENBERG, 384 U.S. 375, 379 (1966) 6

CODISPOTI v. PENNSYLVANIA, 418 U.S. 506, 512 (1974) 6,8

DABEZIES v. BOURG, 273 So.2d 622, 626 (La.App.1973), cert. den., 277 So.2d 445 (1973) 10

DE STEFANO v. WOODS, 392 U.S. 631, 633-634 (1968) 14

DISTRICT OF COLUMBIA v. CLAWANS, 300 U.S. 617, 624 (1937) 6

DISTRICT OF COLUMBIA v. COLTS, 282 U.S. 63, 72-73 (1930) 6

DUNCAN v. LOUISIANA, 391 U.S. 145, 149 (1968) ... 6,8,9

DYKE v. TAYLOR IMPLEMENT MFG CO., 391 U.S. 216, 219-220 (1968) 6,8

FRANK v. UNITED STATES, 395 U.S. 147, 148 (1969) 6,8,12

GAITHOR v. UNITED STATES, 251 A.2d 644 (D.C.App.1969) 10

GANNON, In re, 26 Cal.App.3d 731, 103 Cal.Rptr. 224, 228-229 (Ct.App.1972) 10

HAMILTON v. WALKER, 65 N.M. 470, 340 P.2d 407, 408-409 (Sup. Ct. 1959) 11

HILLIARD v. GAINESVILLE, 213 So.2d 689, 691 (Fla.Sup.Ct.1968) app. dism'd 393 U.S. 321 (1969).... 11

JOHNSON v. LOUISIANA, 406 U.S. 356 (1972)..... 14

JOHNSON v. TURNER, 429 F.2d 1152, 1154 (10 Cir. 1970) 9

LATIMER v. WILSON, 103 N.J.L. 159, 164, 134 A. 750 (E.&A.1926) 7

BLEED THROU

CASES CITED (continued) PAGE

LAWTON v. STEELE, 152 U.S. 133 (1894) 6

FMONROE v. WILHITE, 255 La. 838, 233 So.2d 535, 536 (Sup.Ct.1970), cert. den., 400 U.S. 910 (1970) 11

MUNIZ v. HOFFMAN, 422 U.S. 454 (1975) 8

NATAL v. LOUISIANA, 139 U.S. 621 (1891) 6

NORVELL v. ILLINOIS, 373 U.S. 420, 424 (1963) 14

PHILIPPS v. UNITED STATES, 457 F.2d 1313 (8 Cir. 1972) 9

PUERTO RICO NEWSPAPER GUILD LOCAL, In re, 225, 476 F.2d 856, 857-858 (1 Cir.1973) 9

ROTHWEILER v. SUPERIOR CT. OF PIMA CTY., 100 Ariz. 7, 410 P.2d 479 (1966) 9

ST. PAUL v. ULMER, 261 Minn. 178, 111 N.W.2d 612, 618-619 (Sup.Ct.1961) 10

SCHICK v. UNITED STATES, 195 U.S. 65 (1904) 6

SHAFSKY v. CASPER, 487 P.2d 468, 471 (Wyo.Sup.Ct.1971) 10

SMITH v. STATE, 17 Md.App. 217, 301 A.2d 54, 61-64 (Ct.App.1973) 12,13

STATE v. CONNORS, 129 N.J. Super. 476, 481-482, 324 A.2d 85 (App.Div.1974) 7

STATE v. CUSICK, 110 N.J. Super. 149, 151, 264 A.2d 735 (App.Div.1970) 7

STATE v. GREEN, 277 N.C. 188, 176 S.E.2d 756, 760 (Sup.Ct.1970) 10

STATE v. HENDRICKS, 309 So.2d 232, 233 (Fla.App.1975) 11

STATE v. HOLLIDAY, ____R.I.____, 280 A.2d 333, 338 (Sup.Ct.1971) 10

STATE v. JOHNSON, 191 Neb. 535, 216 N.W.2d 517, 518-519 (Sup.Ct.1974), cert. den., 419 U.S. 949 (1974) 10

SH POOR COPY

CASES CITED (continued) PAGE

STATE v. JONES, 191 Neb. 538, 216 N.W.2d 519, 520 (Sup.Ct.1974) 11

STATE v. MACUK, 57 N.J. 1, 9-10, 268 A.2d 1 (1970) ... 7,12

STATE v. MAIER, 13 N.J. 235, 277, 99 A.2d 21 (1953) .. 7

STATE v. OWNES, 54 N.J. 153, 159-162, 254 A.2d 97 (1969), cert. den., 396 U.S. 1021 (1970) 7

STATE v. RODGERS, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917) 7

STATE v. SHAK, 51 Haw. 612, 466 P.2d 422, 424-425 (Sup.Ct.1970) cert. den., 400 U.S. 930 (1970) 10

STATE v. TABISZ, 129 N.J. Super. 80, 322 A.2d 453 (App.Div.1974) 3

STATE v. THIGPEN, ____La.____, 275 So.2d 760, 761 (Sup.Ct.1973) 10

STATE v. YOUNG, 194 Neb. 544, 234 N.W.2d 196, 197-198 (Sup.Ct.1975) 11

STATE v. ZUCCONI, 93 N.J. Super. 380, 384-387, 226 A.2d 16 (App.Div.1967), aff'd 50 N.J. 361, 235 A.2d 193 (1967) 7

STATE ex rel. DE CONCINI v. TUCSON CITY CT., 9 Ariz. App. 522, 454 P.2d 192 (Ct.App.1969) 10

TAYLOR v. HAYES, 418 U.S. 488, 495 (1974) 8

UNION NACIONAL DE TRABAJADORES, In re, 502 F.2d 113, 116 (1 Cir.1974) 9

UNITED STATES v. CAIN, 454 F.2d 1285, 1287-1288 (7 Cir. 1972) 9

UNITED STATES v. FLOYD, 477 F.2d 217, 221-222 (10 Cir. 1973), cert. den., 414 U.S. 1044 (1973) 9

UNITED STATES v. GOELTZ, 513 F.2d 193, 195-196, cert. den., ____U.S.____, 96 S.Ct. 51 (1975) (10 Cir. 1975) 9

BLEED THR

CASES CITED (continued) PAGE

UNITED STATES v. IRELAND, 493 F.2d 1208, 1209 (4 Cir. 1973) 9

UNITED STATES v. JARMAN, 491 F.2d 764, 767 (4 Cir. 1974) 9

UNITED STATES v. MERRICK, 459 F.2d 644, 645 (4 Cir. 1972) 9

UNITED STATES v. POTVIN, 481 F.2d 388, 381 (10 Cir. 1973) 9

UNITED STATES v. PROFFITT, 498 F.2d 1124, 1127 (3 Cir. 1974), cert. den., 419 U.S. 1002 (1974) 9

UNITED STATES v. ROGERS, 354 F.Supp. 502 (D.Colo.1973) 9

VADNAIS HEIGHTS v. BEARDSLEY, 296 Minn. 154, 207 N.W.2d 339, 340 (Sup.Ct.1973) 10

VIRGINIA ex rel. SHIFFLETT v. COOK, 333 F.Supp. 718, 720-721 (W.D.Va.1971) 9,13

WILLIAMS v. FLORIDA, 399 U.S. 78 (1970) 14

UNITED STATES CONSTITUTION CITED

Sixth Amendment 4,5

Fourteenth Amendment 4

Article III, Section II 5

NEW JERSEY CONSTITUTION CITED

Article I, Paragraph 9 1,5

NEW JERSEY STATUTES CITED

N.J.S.A. 39:4-39 11

N.J.S.A. 39:4-50(a) 2,4

N.J.S.A. 39:4-86 2,4

UGH POOR COPY

CASES CITED (continued) PAGE

NEW JERSEY RULES CITED

R.1:2-1 7
R.3:23 2
R.7:4-2(a)(1) 7
R.7:4-2(a)(2) 7
R.7:4-2(e) 7
R.7:4-2(g) 7
R.7:5-1 7

OTHER SOURCES CITED

16 A.L.R.3d 1373 (1967) 7

TABLE TO APPENDIX

Brief Filed By Petitioner With The Appellate Division Of The Superior Court Of New Jersey, Page 27 ..... R1a
New Jersey Constitution, Article I, Paragraph 9 ..... R2a
N.J.S.A. 39:4-86 ..... R3a
New Jersey Court Rule 3:23-1 ..... R4a
New Jersey Court Rule 1:2-1 ..... R5a
New Jersey Court Rule 7:4-2 ..... R6a
New Jersey Court Rule 7:5-1 ..... R9a

BLEED THROUGH

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED*

New Jersey Constitution, Article I, Paragraph 9:

> The right of trial by jury shall remain inviolate . . . (see R2a).

N.J.S.A. 39:4-86. See R3a.
New Jersey Court Rule 3:23-1. See R4a.
New Jersey Court Rule 1:2-1. See R5a.
New Jersey Court Rule 7:4-2. See R6a, R7a.
New Jersey Court Rule 7:5-1. See R8a.

* These provisions and statutes are supplemental to those contained in the Petition filed in the instant case.

POOR COPY

Statement of the Case
Procedural History

On December 21, 1973, Summons No. 2725 was issued by the Municipal Court of Lower Township against petitioner Marshall G. Vance. The summons charged petitioner with driving while under the influence of alcohol, contrary to *N.J.S.A.* 39:4-50(a). On the same date, Summons No. 2726 was issued by the Municipal Court of Lower Township charging petitioner with passing on a curve, contrary to *N.J.S.A.* 29:4-86.

On May 11, 1974, a hearing was conducted in the Lower Township Municipal Court before the Honorable Francis Dwyer. Petitioner was found guilty of both charges. On the same date, Judge Dwyer sentenced petitioner to a term of three months in the county jail and suspension of driving privileges for a period of ten years for a second violation of *N.J.S.A.* 39:4-50(a). Petitioner was fined $10 and $5 costs for violation of *N.J.S.A* 39:4-86. On May 13, 1974, petitioner filed a Notice of Appeal to the Cape May County Court pursuant to *N.J. Court Rule* 3:23. A trial *de novo* on the transcripts below was conducted by the Honorable Nathan C. Staller, J.C.C. on December 17, 1974. On that same date petitioner's motion for trial by jury was denied. In a letter opinion of December 26, 1974 the County Court reconvicted petitioner on both charges and reimposed sentences issued by the Municipal Court.

Petitioner filed a Notice of Appeal to the Appellate Division of the Superior Court of New Jersey on January 21, 1975. The cause, including petitioner's jury trial claim, was argued before that court on November 3, 1975. On November 18, 1975 the Appellate Division rejected petitioner's jury trial argument and affirmed his conviction. A Petition for Certification to the Appellate Division was filed by petitioner on December 17, 1975 with the Supreme Court of New Jersey. The Petition was denied on March 2, 1976. On May 31, 1976 petitioner filed with this Court a Petition for Writ of Certiorari.

BLEED THROUGH

Factual Background

The facts giving rise to the present litigation were adduced at the Municipal Court proceeding below.[1] Petitioner had staggered into a service station on December 21, 1973. He reeked of alcohol. His speech was slurred and his dress dishevelled. Petitioner acted aggressively and obnoxiously to the service station owner and his attendant. The station owner accompanied petitioner to the latter's vehicle which was embedded in sand and smelt strongly of alcohol. The vehicle was towed to the service station where petitioner threatened the station owner and refused to pay the towing bill.

The station owner summoned a policeman who advised petitioner that he was inebriated and suggested that petitioner take a taxi home. The officer departed and petitioner, ignoring the warnings of the station owner, drove away. A second policeman, who was on his way to the station for backup duty, observed petitioner leave the station. Petitioner's car swerved, once passing over the white line dividing the highway. Petitioner then passed two vehicles on a curve (a designated non-passing zone). The pursuing officer turned on his patrol car's siren and flashing lights. Petitioner ignored these signals and stopped his automobile only upon receiving hand signals from the officer. When petitioner emerged from the vehicle he acted aggressively and manifested the symptoms of extreme drunkenness, *i.e.* bloodshot eyes, slurred speech, staggering gait and odor of alcohol. These symptoms persisted through petitioner's processing at the Lower Township Police Headquarters. Petitioner declined to take a breathalyzer test.[2]

At trial petitioner was unable to recall the events surrounding his arrest.

---

[1] This factual statement is drawn from the testimony of five eyewitnesses.

[2] Evidence of the refusal to take the breathalyzer was stricken by the Municipal Court although under New Jersey law such evidence is admissible. See *State v. Tabisz*, 129 *N.J. Super.* 80, 322 *A.2d* 453 (App. Div. 1974).

POOR COPY

Reasons for Denying Certiorari

The Sixth and Fourteenth Amendments Do Not Require a State To Provide A Jury Trial In The Prosecution Of A Recidivist Drunk Driver Where Conviction Results In A Mandatory Sentence Of Three Months Imprisonment And Loss Of Driving Privileges For Ten Years.

Petitioner was convicted of operating a motor vehicle while under the influence of intoxicating liquor in violation of *N.J.S.A.* 39:4-50(a).[3] Since petitioner had been previously convicted of violating this statute he was sentenced both in Municipal Court and in County Court (following a trial *de novo* on the record below) to the mandatory statutory penalty of three months imprisonment and a ten year revocation of his driver's license.[4] Prior to the trial *de novo* in the County Court petitioner demanded a jury trial on the

---

[3] In addition petitioner was convicted of passing on a curve in violation of *N.J.S.A.* 39:4-86. A fine of $10 and $5 costs was imposed on this charge. No claim regarding this offense is raised in the Petition.

[4] *N.J.S.A.* 39:4-50(a) provides that for a subsequent violation (within ten years of the earlier violation) of that statute a defendant,

> . . . shall be imprisoned for a term of 3 months and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of 10 years from the date of his conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a lice to operate a motor vehicle, which application may be granted at the discretion of the director.

BLEED THROUGH

Reasons for Denying Certiorari (Continued)

driving while intoxicated charge. (P5a).[5] This claim was denied by the County Court. (P7a). In an appeal to the Appellate Division of the Superior Court of New Jersey petitioner pursued his jury trial by demand, relying on the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Paragraph 9 of the New Jersey Constitution. (R2a).[6] The Appellate Division rejected these claims (P2a), which petitioner again raised in a Petition for Certification filed with the Supreme Court of New Jersey. That Petition was denied. (P4a). In his Petition for Certiorari petitioner has again asserted that he was entitled to a jury trial in the County Court under the provisions of the Sixth and Fourteenth Amendments. Respondent respectfully disagrees.

The right to trial "by an impartial jury" is guaranteed to a defendant "[i]n all criminal prosecutions" by the Sixth Amendment. Initially this right applied only in federal prosecutions.[7] See *Barron v. Mayor and City Council*, 32 *U.S.* 243 (1833). In 1968 this Court found that the right to a

---

[5] Respondent notes that the record does not disclose whether federal constitutional provisions were relied on by petitioner for this claim before the County Court. In his appeal to the Appellate Division of the Superior Court of New Jersey, petitioner did explicitly rely on both federal and state constitutional guarantees to support his jury trial demand. (R1a).

[6] Article I, Paragraph 9 of the New Jersey Constitution provides:

> The right of trial by jury shall remain inviolate . . .

[7] Jury trials were also required in federal prosecutions by Article III, Section II of the United States Constitution which provided:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

POOR COPY

Reasons for Denying Certiorari (Continued)

jury trial in criminal prosecutions was "fundamental to the American scheme of justice" and, pursuant to the Fourteenth Amendment, held that the Jury Trial Clause of the Sixth Amendment was applicable in state criminal prosecutions. *Duncan v. Louisiana*, 391 *U.S.* 145, 149 (1968). Petitioner's sole claim is that the Sixth Amendment required the State of New Jersey to afford him a trial by jury in a drunk driving prosecution where the mandatory statutory sentence is three months imprisonment and a ten year suspension of driving privileges. This contention is lacking in both logic and precedential support.

In *Duncan* this Court specifically disclaimed the intention to require jury trials in all state prosecutions of whatever nature. Rather, this Court recognized the existence of,

> ...a category of petty crimes or offenses which is not subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses...[at 159].

Summary disposition of cases involving petty offenses has long been upheld by this Court in the face of Sixth Amendment claims. *Taylor v. Hayes*, 418 *U.S.* 488, 495 (1974); *Codispoti v. Pennsylvania*, 418 *U.S.* 506, 512 (1974); *Frank v. United States*, 395 *U.S.* 147, 148 (1969); *Dyke v. Taylor Implement Mfg. Co.*, 391 *U.S.* 216, 219-220 (1968); *Bloom v. Illinois*, 391 *U.S.* 194, 198 (1968); *Cheff v. Schnackenberg*, 384 *U.S.* 375, 379 (1966); *District of Columbia v. Clawans*, 300 *U.S.* 617, 624 (1937); *District of Columbia v. Colts*, 282 *U.S.* 63, 72-73 (1930); *Schick v. United States*, 195 *U.S.* 65 (1904); *Natal v. Louisiana*, 139 *U.S.* 621 (1891); *Callan v. Wilson*, 127 *U.S.* 540 (1888). *Cf. Lawton v. Steele*, 152 *U.S.* 133 (1894). Respondent believes that a drunk driv-

BLEED THROUGH

ing prosecution under *N.J.S.A.* 39:4-50 (a) constitutes a petty offense within the meaning of the above cases.

Under New Jersey law an offense punishable by no more than six months imprisonment and a $500 fine is a "petty offense" which may be tried without a jury. *State v. Ownes*, 54 *N.J.* 153, 159-162, 254 *A.2d* 97 (1969), *cert.* den. 396 *U.S.* 1021 (1970); *In re Briehrer*, 50 *N.J.* 501, 517-518, 236 *A.2d* 592 (1967). Motor vehicle offenses are considered to be within this classification and hence triable to a municipal magistrate and thereafter to a judge of the County Court.[8] See *State v. Macuk*, 57 *N.J.* 1, 9-10, 268 *A.2d* 1 (1970); *State v. Maier*, 13 *N.J.* 235, 277, 99 *A.2d* 21 (1953); *State v. Zucconi*, 93 *N.J.Super.* 380, 384-387, 226 *A.2d* 16 (App.Div. 1967), aff'd 50 *N.J.* 361, 235 *A.2d* 193 (1967); *State v. Connors*, 129 *N.J.Super.* 476, 481-482, 324 *A.2d* 85 (App.Div. 1974); *State v. Cusick*, 110 *N.J.Super.* 149, 151, 264 *A.2d* 735 (App.Div. 1970); *Latimer v. Wilson*, 103 *N.J.L.* 159, 164, 134 A. 750 (E.&A. 1926); *Caruso v. Porter*, 102 *N.J.L.* 71, 73, 130 *A.* 805 (Sup.Ct. 1925); *State v. Rodgers*, 91 *N.J.L.* 212, 102 A. 433 (E.&A. 1917). See also Annotation, "Drunk Driving-Jury Trial," 16 *A.L.R.3d* 1373 (1967).

Delineation of the line between "serious" and "petty" offenses was addressed by this Court in *Duncan*, *supra*. The Court found it necessary to draw a somewhat arbitrary line and stated that,

---

[8] New Jersey law broadly applies the incidents of due process to proceedings, both administrative and judicial, that involve possible revocation of driving privileges. See *e.g. In re Arndt*, 67 *N.J.* 432, 436, 341 *A.2d* 596 (1975). In a Municipal Court prosecution a defendant, such as petitioner, is afforded notice, counsel, pretrial discovery, bail and a public trial with the opportunity to make objections, present defenses and confront the witnesses against him or her. See *New Jersey Court Rules* 1:2-1; 7:4-2(a) (1); 7:4-2(a) (2); 7:4-2(e); 7:4-2 (g); 7:5-1.

POOR COPY

Reasons for Denying Certioari (Continued)

> ...the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.
>
> *Duncan v. Louisiana, supra* at 159.

This Court went on to emphasize that it is the statutory maximum, not the sentence actually imposed, that determines the "seriousness" of the crime for Sixth Amendment purposes. *Duncan v. Louisiana, supra* at 160. Accord, *Dyke v. Taylor Implement Mfg. Co.*, 391 *U.S.* 216, 220 (1968). Subsequently, this Court described the six month incarceration requirement as a "fixed dividing line between petty and serious offenses." *Codispoti v. Pennsylvania*, 418 *U.S.* 506, 512 (1974).

Seemingly recognizing this, petitioner argues that the ten year revocation of driving privileges mandated by *N.J.S.A.* 39:4-50(a) is sufficient to make a violation of that statute a serious offense. This Court recognized in *Baldwin v. New York*, 399 *U.S.* 66, 69-70 (1970) that "collateral consequences, such as loss of occupation and other civil disabilities, may accompany a fine and incarceration but declined to attach much significance to such factors in determining the scope of the Sixth Amendment jury trial guarantee. Rather, this Court reaffirmed the rule that the surest indicia of the seriousness of an offense and the community's attitude toward that offense could be found in the maximum authorized period of incarceration. *Baldwin v. New York, supra.* Accord, *Taylor v. Hayes*, 418 *U.S.* 488, 495 (1974); *Frank v. United States*, 395 *U.S.* 147, 148-149 (1969). Quite recently this Court reaffirmed that approach and upheld the imposition of a $10,000 fine after a summary proceeding in which the defendant's jury trial demand had been rejected. *Muniz v. Hoffman*, 422 *U.S.* 454 (1975).

BLEED THROU

Reasons for Denying Certiorari (Continued)

Lower federal courts have also recognized the distinction between "petty" and "serious" offenses in determining the sweep of the Jury Trial Clause of the Sixth Amendment. *United States v. Potvin*, 481 *F.2d* 380, 381 (10 Cir. 1973); *United States v. Floyd*, 477 *F.2d* 217, 221-222 (10 Cir. 1973), *cert.* den. 414 *U.S.* 1044 (1973); *United States v. Merrick*, 459 *F.2d* 644, 645 (4 Cir. 1972); *Johnson v. Turner*, 429 *F.2d* 1152, 1154 (10 Cir. 1970); *United States v. Rogers*, 354 *F.Supp.* 502 (D. Colo. 1973). These courts have consistently looked to the maximum imposable penalty in determining the seriousness of an offense. See *e.g. United States v. Goeltz*, 513 *F.2d* 193, 195-196, *cert.* den. ——*U.S.*——, 96 *S.Ct.* 51 (1975) (10 Cir. 1975); *In re Puerto Rico Newspaper Guild Local* 225, 476 *F.2d* 856, 857-858 (1 Cir. 1973); *Virginia Ex. Rel. Shifflett v. Cook*, 333 *F. Supp.* 718, 720-721 (W.D. Va. 1971). Where that penalty did not or could not legally exceed the six months/$500 standard set forth in *Duncan*, *supra* and *Baldwin*, *supra* no right to a jury trial was found to exist. *In Re Union Nacional De Trabajadores*, 502 *F.2d* 113, 116 (1 Cir. 1974); *United States v. Proffitt*, 498 *F.2d* 1124, 1127 (3 Cir. 1974), *cert.* den. 419 *U.S.* 1002 (1974); *United States v. Jarman*, 491 *F.2d* 764, 767 (4 Cir. 1974); *United States v. Ireland*, 493 *F.2d* 1208, 1209 (4 Cir. 1973); *United States v. Merrick*, *supra*, 459 *F.2d* at 645; *United States v. Cain*, 454 *F.2d* 1285, 1287-1288 (7 Cir. 1972). *Cf. Philipps v. United States*, 457 *F.2d* 1313 (8 Cir. 1972).

Petitioner relies heavily on *Rothweiler v. Superior Ct. of Pima Cty.*, 100 *Ariz.* 7, 410 *P.2d* 479 (1966), a pre-*Duncan* case which held that a jury trial was required in a drunk driving prosecution where the defendant, upon conviction, was liable to a $100 to $300 fine, imprisonment for 10 days to 6 months and license revocation for a period of up to 90 days. In reaching this conclusion the *Rothweiler* court specifically relied on a provision in the Arizona Constitution and disclaimed any intention of deciding the case under the

POOR COPY

Reasons for Denying Certiorari (Continued)

Sixth Amendment to the United States Constitution. *Id.* at 484-485. Respondent finds it difficult to understand how *Rothweiler* can possibly bolster Petitioner's federal claim. That case merely reflects the application of a state originated right to a jury trial, which may of course be broader than that established by the Sixth and Fourteenth Amendments. See *e.g. Vadnais Heights v. Beardsley*, 296 *Minn.* 154, 207 *N.W.* 2*d* 339, 340 (Sup.Ct. 1973); *St. Paul v. Ulmer*, 261 *Minn.* 178, 111 *N.W.*2*d* 612, 618-619 (Sup.Ct. 1961); *Buffalo v. Cannizzario*, 17 *Misc.*2*d* 839, 188 *N.Y.S.*2*d* 795, 798 (Sup.Ct. 1959).

Indeed it appears that the petty offense/serious offense distinction is drawn by many states in determining whether a jury trial is required in criminal or quasi-criminal prosecutions. *In Re Gannon*, 26 *Cal.App.*3*d* 731, 103 *Cal.Rptr.* 224, 228-229 (Ct.App. 1972); *Austin v. Denver*, 170 *Colo.* 448, 462 *P.*2*d* 600, 603-604 (Sup.Ct. 1969), *cert.* den. 398 *U.S.* 910 (1970); *State v. Shak*, 51 *Haw.* 612, 466 *P.*2*d* 422, 424-425 (Sup.Ct. 1970), *cert.* den. 400 *U.S.* 930 (1970); *State v. Thigpen*, ——La.——, 275 *So.*2*d* 760, 761 (Sup. Ct. 1973); *Dabezies v. Bourg*, 273 *So.*2*d* 622, 626 (La.App. 1973), *cert.* den. 277 *So.*2*d* 445 (1973); *State v. Johnson*, 191 *Neb.* 535, 216 *N.W.*2*d* 517, 518-519 (Sup. Ct. 1974), *cert.* den. 419 *U.S.* 949 (1974); *State v. Green*, 277 *N.C.* 188, 176 *S.E.*2*d* 756, 760 (Sup.Ct. 1970); *Shafsky v. Casper*, 487 *P.*2*d* 468, 471 (Wyo.Sup.Ct. 1971). *Cf. State v. Holliday*, ——] ——*R.I.* ——, 280 *A.*2*d* 333, 338 (Sup.Ct. 1971).[9] Traffic offenses are generally considered to be petty offenses triable summarily without a jury. See *e.g. State Ex Rel. De Concini v. Tucson City Ct.*, 9 *Ariz.App.* 522, 454 *P.*2*d* 192 (Ct.App. 1969); *State v.*

[9] The District of Columbia Court of Appeals has rejected jury trial claims in cases where the maximum imposable penalty did not exceed six months incarceration. *Austin v. United States*, 299 *A.*2*d* 545, 546-547 (D.C.App. 1973); *Gaithor v. United States*, 251 *A.*2*d* 644 (D.C.App. 1969).

BLEED THROU

Reasons for Denying Certiorari (Continued)

Hendricks, 309 *So.2d* 232, 233 (Fla.App. 1975); *Monroe v. Wilhite*, 255 *La.* 838, 233 *So.2d* 535, 536 (Sup.Dt. 1970); *cert.* den. 400 *U.S.* 910 (1970). Charges alleging recidivist drunk driving have been treated as being within this classification. *Hilliard v. Gainesville*, 213 *So.2d* 689, 691 (Fla.Sup.Ct. 1968), app. dism'd 393 *U.S.* 321 (1969); *State v. Young*, 194 *Neb.* 544, 234 *N.W.2d* 196, 197-198 (Sup.Ct. 1975); *Hamilton v. Walker*, 65 *N.M.* 470, 340 *P.2d* 407, 408-409 (Sup.Ct. 1959); *Albuquerque v. Arias*, 64 *N.M.* 337, 328 *P.2d* 593, 594 (Sup.Ct. 1958).

Petitioner seeks to support his jury trial claim by focusing on: (1) the mandatory three month period of incarceration for second offenders under *N.J.S.A.* 39:4-50(a) and, (2) the mandatory ten year period of license revocation. As noted above the *Duncan* standard pertains to maximum imposable sentences exceeding six months incarceration. Mandatory periods of incarceration not surpassing the six month criteria do not give rise to a constitutional right to a jury trial. *State v. Jones*, 191 *Neb.* 538, 216 *N.W.2d* 519, 520 (Sup.Ct. 1974). In *Jones* the Nebraska Supreme Court rejected the jury trial demand of a second offense drunk driver who faced a mandatory term of *six* months imprisonment upon conviction. *Id.* Moreover respondent notes that a violation of *N.J.S.A.* 39:4-50(a) arises only when a relatively high degree of drunkenness has been exhibited by the operator of a motor vehicle. *N.J.S.A.* 39:4-39 creates a two tiered system of drunk driving proscriptions. Subsection b. of that statute forbids driving while "impaired" and sets penalties considerably lower than *N.J.S.A.* 39:4-50(a) which proscribes driving while intoxicated. Petitioner was convicted of violating subsection a. and properly faced the more stringent penalties prescribed by that statute. This bifurcated treatment of offenders based on the degree of drunkenness exhibited does not represent an arbitrary imposition of penal sanctions as implied by Petitioner. Rather it reflects a deep

SH POOR COPY

seated concern with the danger associated with drunk driving and an attempt to match the degree of peril to the public with a system of penalties.

The imposition of a mandatory ten year revocation of driving privileges does not elevate *N.J.S.A.* 39:4-50(a) into that category of "serious" crimes that must, under the Sixth Amendment, be tried before a jury. New Jersey statutory law, the best indicia of community sentiment, considers second offense drunk driving to be a petty offense. *State v. Macuk*, *supra*, 57 *N.J.* at 9-10. The loss of driving privileges only constitutes a collateral consequence and cannot be said to so augment the three month period of incarceration as to bring *N.J.S.A.* 39:4-50(a) within the scope of the Sixth Amendment. In *Baldwin v. New York*, *supra* this Court declined to attach much significance to "collateral consequences" such as loss of occupation in evaluating a jury trial claim. See *Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 *N.C.* 503, 169 *S.E.2d* 867 (App.Ct. 1969) (Loss of re-employment rights and unemployment privileges did not create a right to jury trial on contempt charge where maximum imposable sentence was six months imprisonment or a $500 fine). Mandatory license revocation accompanying a three month period of incarceration has been held not to give rise to a right to a jury trial under the Sixth Amendment. *Smith v. State*, 17 *Md.App.* 217, 301 *A.2d* 54, 61-64 (Ct.App. 1973). Similarly in *Frank v. United States*, 395 *U.S.* 147 (1969), this Court ruled that a five year period of probation could be coupled with up to six months imprisonment and a $500 fine without giving the defendant a right to a jury trial. *Id.* 151-152. This Court reached that conclusion even while acknowledging that probation constituted "a significant infringement of personal freedom." *Id.* at 151. Clearly a ten year loss of driving privileges, which involves no loss of personal liberty, does not give rise to a constitutionally protected right to a jury trial.

Reasons for Denying Certiorari (Continued)

This position is bolstered by an analysis of the nature of license revocation. Revocation of a driver's license under a drunk driving statute such as *N.J.S.A.* 39:4-50(a) is punitive only in its incidental effect. The principal purpose of such legislation is the protection of the public from recidivist drunk drivers like Petitioner and,

> ...the furtherance of the public safety and welfare, necessary to the proper administration of the traffic laws, rather than punishment. *State v. Smith, supra,* 17 *Md.App.* at ,301 *A.2d* at 64.

Accord, *Virginia Ex. Rel. Shifflett v. Cook, Supra,* 333 *F. Supp.* at 720.

The power to revoke an individual's driving privileges in order to protect the public safety on the highways lies very close to the heart of those police powers reserved to the states by the Tenth Amendment. *Berberian v. Lussier,* 87 *R.I.* 226, 139 *A.2d* 869 (Sup.Ct. 1958).[10] In the present case Petitioner was afforded due process in two successive evidentiary hearings and in each instance he was adjudged guilty of driving while intoxicated in violation of *N.J.S.A.* 39:4-50(a). Petitioner

---

[10] In *Berberian* the Supreme Court of Rhode Island stated:

> Whatever may be its nature, the right to use the public highways for travel by motor vehicle is one which properly can be regulated by the legislature in the valid exercise of the police power of the state... a valid exercise of such power is not violative of the fourteenth amendment of the federal constitution even though protected interests are affected. *Berberian v. Lussier, supra,* 139 *A.2d* at 872.

raises no claim of innocence before this Court in his assertion of a right to a jury trial under the Sixth and Fourteenth Amendments.[11] The states must be accorded flexibility in exercising their police powers. The imposition of a rigid jury trial requirement under the Sixth and Fourteenth Amendments would seriously handicap efforts to guarantee traffic safety and protect the general public from the menace of drunk drivers. Trial of such offenders in New Jersey before a Municipal Court Judge with trial *de novo* in County Court constitutes the form of "practical accommodation" with the Due Process Clause that this Court has approved in the past. *Norvell v. Illinois*, 373 *U.S.* 420, 424 (1963).[12]

Respondent respectfully submits that this Court has established a clear dividing line between petty offenses triable to a magistrate and serious crimes which require the availability of jury trials under the Sixth and Fourteenth Amendments. Where the maximum imposable penalty does not exceed six months incarceration and a $500 fine there exists no federally guaranteed right to a jury trial in a state prosecution. Petitioner was liable to, and received, the mandatory sentence of three months imprisonment and a ten year revocation of driving privileges as authorized by *N.J.S.A.* 39:4-50(a). Since the

---

[11]Jury fact-finding is not intrinsically superior to judicial fact-finding and the availability of a jury trial does not therefore substantially enhance the truth determinative process at trial. *De Stefano v. Woods*, 392 *U.S.* 631, 633-634 (1968); *Duncan v. Louisiana*, *supra* at 158.

[12]It should be noted that under this Court's prior decisions the states are allowed greater freedom than the federal government in satisfying the demands of the Jury Trial Clause of the Sixth Amendment. States may try criminal cases to juries of less than twelve persons and may convict or acquit on non-unanimous jury verdicts. *Apodaca v. Oregon*, 406 *U.S.* 404 (1972); *Johnson v. Louisiana*, 406 *U.S.* 356 (1972); *Williams v. Florida*, 399 *U.S.* 78 (1970).

BLEED THROUGH

custodial sentence did not exceed six months under the criteria established in *Duncan* and its progeny Petitioner had no Sixth or Fourteenth Amendment right to a jury trial on the recidivist drunk driving charge. The ten year revocation of Petitioner's driver's license is a collateral consequence, designed to safeguard the public, that does not elevate the sanction prescribed in *N.J.S.A.* 39:4-50(a) to such dimensions that a jury trial is required by the United States Constitution.

POOR COPY

Conclusion

For the reasons set forth herein, it is respectfully urged that the Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM F. HYLAND
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

DAVID S. BAIME
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE

OF COUNSEL

ROBERT E. ROCHFORD
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE

ON THE BRIEF.

Brief Filed by Petitioner with the Appellate Division of the Superior Court of New Jersey, Page 27.

. . .

The right to a jury is a basic safeguard interposed between the individual and the State. Concepts of fundamental fairness embodied in due process of law require that the defendant be given such protection as a matter of right. The Sixth and Fourteenth Amendments to the Constitution of the United States as well as Article I, Para. 1 of the Constitution of the State of New Jersey dictate that a trial by jury be afforded to the defendant.

New Jersey Constitution, Article I, Paragraph 9.

The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons when the matter in dispute does not exceed fifty dollars. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

N.J.S.A. 39:4-86.

The driver of a vehicle shall not drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless the left side is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit the overtaking and passing to be made in safety.

The driver of a vehicle shall not drive to the left of the center of a highway in order to overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of five hundred feet.

Except when otherwise directed by a duly constituted traffic or police officer or when the lane in which he is operating is obstructed and impassable, the driver of a vehicle shall not cross an appropriately marked "No Passing" line in a "No Passing" zone duly established pursuant to a duly promulgated regulation of the State Highway Commissioner or an ordinance or resolution duly adopted by a municipal governing body or a board of chosen freeholders, whichever has jurisdiction over the highway.

New Jersey Court Rule 3:23-1.

Except as provided by R.2:2-3(b), review of a judgment of conviction in a criminal action or proceeding in a court of limited criminal jurisdiction shall be by appeal as provided by R.3:23.

New Jersey Court Rule 1:2-1.

All trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute. Settlement conferences, however, may be heard at the bench or in chambers. Every judge shall wear judicial robes during proceedings in open court.

New Jersey Court Rule 7:4-2
(cont. 7a)

Proceedings Before Trial

(a) Arraignment.

(1) Except as otherwise provided by paragraph (2) of this rule, arraignment shall be conducted in open court and shall consist of reading the complaint to the defendant or stating to him the substance of the charge, and calling on him, after he is given a copy of the complaint, to plead thereto. The defendant may waive the reading of the complaint.

(2) When a defendant is represented by an attorney and desires to plead not guilty, unless the court otherwise orders, such plea shall be entered by the filing, at or before the time fixed for arraignment, of a written statement, signed by the attorney, certifying that the defendant has received a copy of the complaint, has read it or the attorney has read it or explained it to him, understands the substance of the charge, and pleads not guilty to the charge.

(b) Pleas. A defendant may plead not guilty or guilty, but the court may in its discretion refuse to accept a plea of guilty, and shall not accept such plea without first addressing the defendant personally and determining by inquiry of the defendant and of others in the court's discretion that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea. Upon the request of the defendant the court may at the time of the acceptance of a plea of guilty order that such plea shall not be evidential in any civil proceeding. If a defendant refuses to plead or stands mute or if the court refuses to accept a plea of guilty, the court shall enter a plea of not guilty. If a plea of guilty is entered, the court may hear the witnesses in support of the complaint prior to judgment and sentence, and after such hearing may, in its discretion, refuse to accept the plea. Except as otherwise provided by R. 7:7-4, a plea or appearance by a defendant corporation,

New Jersey Court Rule 7:4-2
(Continued from 6a)

partnership or unincorporated association must be made by an attorney at law of this State. If the defendant is a corporation, partnership or unincorporated association and fails to respond to an order entered pursuant to R. 7:3-1(c), the court, if satisfied that service was duly made, shall enter an appearance and a plea of not guilty for the defendant and thereupon proceed to hear the complaint.

(c) Adjournment. On or before the return day of a warrant or summons, the court may adjourn the hearing for a period not exceeding 14 days, except that an adjournment for a longer period or additional adjournments may be granted if the court deems postponement of the hearing to be reasonably necessary. In contested matters the court, on granting an adjournment, shall specify a trial date. The court shall cause the complaining witness, all defendants and all other known witnesses to be notified of any adjournment, which together with the reasons therefor, shall be noted in the record.

(d) Pretrial Procedure. The pretrial procedure provided by R. 3:13-1 may be employed in the court's discretion upon its own or a party's motion.

(e) Motions. R. 3:10-1 (defenses and objections which may be raised), R. 3:10-2 (defenses and objections which must be raised before trial), R. 3:10-3 (defenses and objections which may be raised only before or after trial), and R. 3:10-4 (defense of lack of jurisdiction) are applicable to actions in the municipal court except that for purposes of this rule the reference in R. 3:10-2, to indictment or accusation shall be deemed to mean the complaint and R. 3:10-3 shall be deemed also to include the defense that an ordinance under which a complaint is made is unconstitutional. The court shall upon request provide an opportunity for the presentation of such motions before proceeding to trial. Motions may be made orally and informally, but affidavits or oral testimony may be presented thereon when required. A motion shall include all such defenses and objections then available to the defendant. The court or clerk shall

GH POOR COPY

New Jersey Court Rule 7:4-2
(Continued from 7a)

briefly note in the record all defenses or objections raised by motion and the disposition thereof. Appeals from interlocutory orders dismissing or refusing to dismiss a complaint may be taken to the county court pursuant to R. 3:24.

(f) Trial of Complaints Together. The court may order that 2 or more complaints be tried together if the offenses arose out of the same facts and circumstances, regardless of the number of defendants. In all other matters, with the consent of the persons charged, the court, for convenience, may consolidate complaints for trial.

(g) Depositions and Discovery. The court may order depositions to be taken and discovery made in criminal actions as provided by R. 3:13-2 and R. 3:13-3.

(h) Dismissal. If the complaint is not moved on the return day, the court may direct that it be heard on a specified date and a notice thereof be served on the complaining witness, all defendants and all other known witnesses by subpoena. Upon failure of trial to be held on the day set, the court, after first notifying the county prosecutor if the offense charged is indictable, may order the complaint dismissed. A complaint may be dismissed by the court for good cause at any time on the motion of the state or municipality or on the motion of the defendant, and a complaint on file for more than 6 months may be dismissed for failure to prosecute by the court on its own motion. Written notice of a motion to dismiss shall be served, by ordinary mail or in such other manner as the court directs, on the prosecuting attorney, the defendant, the complaining witness, and, if the complaint charges an indictable offense, also on the county prosecutor, at least 10 days before the date specified for the hearing thereof.

New Jersey Court Rule 7:4-2
(Continued from 8a)

New Jersey Court Rule 7:5-1.

Except as otherwise provided by R. 7:5-2 and 7:5-3, the provisions of R. 3:26-1(a) (bail before conviction), 3:26-2 (authority to admit to bail), 3:26-3 (bail for witness), 3:26-4 (deposit of bail), 3:26-5 (justification of sureties), 3:26-6 (forfeiture), and 3:26-7 (exoneration) apply to the municipal and county district courts.